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NTSB Order No. EA-4816

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of January, 2000

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. DONALD JOSEPH VECCHIE, Respondent.	Docket SE-15781

OPINION AND ORDER

Respondent appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., rendered after an evidentiary hearing held on December 21, 1999.[1] By that

[1] An excerpt from the hearing transcript containing the law judge's initial decision is attached.

decision, the law judge affirmed the Administrator's emergency order of revocation of respondent's airline transport pilot ("ATP") certificate for his alleged violation of section 61.59(a)(1), 14 CFR Part 61, of the Federal Aviation Regulations ("FAR").[2] We grant the appeal.

The record clearly establishes several facts. Respondent is an ATP-rated corporate pilot for Refreshment Services, Inc. ("RSI"), and has accumulated numerous type ratings and approximately 24,000 flight hours. Although respondent normally accomplishes recurrent training and required FAA testing through Flight Safety International, RSI contracted with Quality Aviation Training ("QAT") to conduct training and FAA testing in late October and early November, 1998, for respondent and several other pilots. Respondent underwent recurrent training and, on November 5, 1998, took and passed a recurrent training checkride administered by QAT's James Carey, an FAA-Designated Pilot Examiner ("DPE"), in a Falcon 20 aircraft.

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[2] FAR section 61.59(a)(1) provides as follows:

> **§ 61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.**
>
> (a) No person may make or cause to be made--
>
> (1) Any fraudulent or intentionally false statement on any application for a certificate, rating, or duplicate thereof, issued under this part[.]

According to respondent's unrebutted testimony, following his checkride, DPE Carey asked him to endorse the airman application of Trevor Roberts, a company colleague who had flown with respondent as second-in-command for more than 500 flight hours, and who was applying for an ATP certificate and Falcon 20 type rating. Respondent related that he replied to DPE Carey that he was not a certified flight instructor ("CFI"), but that DPE Carey advised respondent that he could recommend Mr. Roberts for his practical test on the basis that respondent held an ATP certificate, was type rated in the aircraft, and had flown with respondent for more than 500 hours.[3] On this representation, respondent says he endorsed the "Instructor's Recommendation" section of the reverse side of Mr. Roberts' airman application, as requested by DPE Carey. The Administrator claims that this endorsement constituted an intentional falsification because respondent did not hold a CFI certificate.

The relevant portion of the airman application form is titled, "Instructor's Recommendation," and, beneath this heading

[3] The record does not reflect in what type or types of aircraft these flights were flown, nor does it suggest that these flights were not conducted in a Falcon 20 aircraft. Respondent testified that when flying with younger second-in-command pilots, including Mr. Roberts, his practice is "to try to teach [them] all I know about my experience in flying and hope I can learn from [them]. That's how we start out. I'm not a flight instructor, a certified flight instructor. So, it's strictly a basis of my passing on my experience to them." He also testified that Mr. Roberts was "the best co-pilot I ever flew with."

is the printed statement: "I have personally instructed the applicant and consider him ready to take the test." The remainder of this section of the form contains several spaces calling for information and titled "Date," "Instructor's Signature," "Certificate No.," and "Certificate Expires." Respondent dated the form, printed and signed his name, and supplied his ATP certificate number in the corresponding spaces, and, in the space for "Certificate Expires," entered a dash mark.[4] Later that day, after respondent had left, DPE Carey issued Mr. Roberts his Temporary Airman Certificate with ATP privileges and a Falcon 20 type rating.

Subsequently, in mid-1999 during the course of an investigation of DPE Carey, the FAA discovered respondent's endorsement on Mr. Roberts' airman application. After determining that respondent did not hold a CFI certificate, the Administrator initiated this enforcement proceeding. According to the Administrator's complaint, respondent's signature constituted a false attestation that he "had given Mr. Roberts the flight instruction that was required for his type rating application under [FAR section] 61.157(b)(1)" and a written representation that he held a CFI certificate.[5]

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[4] An ATP certificate does not have an expiration date.

[5] FAR 61.157, 14 CFR Part 61, pertains to the ground and flight training that must be received and logged by an ATP certificate and/or type rating applicant. Although Mr. Roberts was

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The law judge, in reviewing the evidence, characterized the issue as one of pilot judgment. He credited respondent's testimony that his initial sense when presented by DPE Carey with Mr. Roberts' application was that he could not sign the recommendation unless he was a CFI certificate holder, and that it was only after DPE Carey's representations to the contrary that he signed the form. However, after noting the numerous airman applications that respondent had submitted on his own behalf over the years, and observing that "the form is very clear on its face," the law judge concluded that respondent "against his will" and "in reliance on" DPE Carey's representations "did not exercise the proper judgement when he signed" Mr. Roberts' application with knowledge that he did not hold a CFI certificate.

On appeal, respondent argues that there was insufficient evidence for the law judge's finding that he made an intentionally false statement in signing Mr. Roberts' airman application.[6] We agree. In order to establish the charge of

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concurrently applying for an ATP certificate and a type rating, the Administrator's complaint appears to be based solely on the type rating portion of that application. This distinction, however, is immaterial for purposes of our review of this record.

[6] The Administrator's reply brief, filed in response to respondent's appeal, argues the contrary position, that the law judge's finding that respondent made an intentionally false statement was "supported by a preponderance of the reliable,

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intentional falsification, it was the Administrator's burden to prove that respondent made a false statement, that he made it with knowledge of its falsity, and that the statement he made was in reference to a material fact. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976). If the evidence fails to support any one of these elements, the allegation fails. In our view, there is insufficient evidence to support a finding that respondent knew that by signing Mr. Roberts' application, as requested by DPE Carey, he was attesting that he was a CFI certificate holder that had provided Mr. Roberts with all of the formal training required for his ATP certificate and type rating.

In reaching his decision, the law judge emphasized respondent's own experience with numerous airman applications, inferring that respondent therefore should have known that only a CFI could endorse the "Instructor's Recommendation" section of the form. However, what respondent should have known is not the issue. See, e.g., Administrator v. Juliao, 7 NTSB 94, 95-96 (1990). The Administrator must show, by a preponderance of the direct and circumstantial evidence, that respondent knew that it was not permissible for him to sign the form as he did.[7] In this

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probative and substantial … evidence."

[7] In light of the articulated rationale of the law judge's decision, he cannot fairly be said to have made an implicit credibility finding against respondent in connection with his

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regard, we note that nowhere on the section of the form that respondent endorsed do the words “certified flight instructor” appear, and respondent did not complete the space regarding certificate expiration in a manner which either expressly held himself out as a CFI or concealed the fact that he did not possess a CFI certificate.

Nor do we think that respondent’s asserted belief that he could sign the form was inherently incredible under the circumstances. Although respondent, as an ATP certificate holder, is expected to exercise the highest degree of care and judgment, and possess knowledge of the FARs, his decision to trust in and accept the counsel of DPE Carey on a subject –- the proper execution of paperwork associated with practical testing -- with which that individual would presumably have more familiarity and expertise does not strike us as unreasonable. Moreover, and in contravention of the law judge’s apparent reasoning that respondent should have known, because of his experience with submitting his own numerous airman applications over his career, that only a CFI could endorse the instructor’s recommendation, respondent’s unrebutted testimony was that “[i]n all of the times I have been to Flight Safety, over 50 times, … I

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disavowal of the knowledge that he needed to be a CFI to sign the form. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

have never known if they signed a form … [and] I don't know who signed my recommendation for those ratings."

Finally, we think it worth noting that the various provisions in the FARs governing acceptable circumstances where ATP certificate holders can provide flight instruction lend credibility to respondent's claimed reliance on DPE Carey's erroneous guidance that he could sign the recommendation on behalf of Mr. Roberts. Although our careful examination of the applicable FAR provisions, and research beyond the evidence presented by the Administrator, convinces us, for the purposes of this appeal, that ATP certificate holders are not permitted to provide formal instruction to other pilots in the course of Part 91 operations -- as all RSI flights crewed together by respondent and Mr. Roberts were apparently conducted –- this conclusion requires careful attention to the subtle distinctions between precise phraseology utilized in various provisions of the FARs. Specifically, FAR section 61.167(b)(1), 14 CFR Part 61, authorizes an ATP certificate holder to instruct "other pilots in air transportation service in aircraft of the category, class, and type, as applicable, for which the airline transport pilot is rated and endorse the logbook or other training record of the person to whom training has been given[.]" The phrase "air transportation service," however, is not defined anywhere within the FARs. According to FAR section 1.1, 14 CFR Part 1, "'air

transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." And, also according to FAR section 1.1, "'Interstate air *transportation*' means the carriage by aircraft of persons or property as a common carrier for compensation or hire, or the carriage of mail by aircraft in commerce...." Yet, FAR section 1.1 also defines "interstate air *commerce*" as "the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation...." Thus, while it appears that Part 91 corporate aircraft operations throughout the United States would qualify as "interstate air commerce," as opposed to "interstate air transportation," and therefore not fall within the category of operations for which FAR section 61.167(b)(1) authorizes ATP certificate holders to endorse the training records of other pilots, this distinction is not so explicit, we think, to require rejection of respondent's claimed belief in DPE Carey's assertion that he could attest, after having flown with Mr. Roberts in excess of 500 flight hours, that he had, in the language of the form, "personally instructed" him and found him "ready to take the test."[8]

[8] In this regard, we also take notice of a clarification posted on the FAA's official web site. There, a question about the (continued . . .)

In sum, we think the law judge erred in affirming the Administrator's order of revocation, for there is insufficient evidence in this record to support a finding that respondent knew that he could not properly endorse Mr. Roberts' application.

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meaning of "air transportation service" within the scope of FAR section 61.167(b)(1) is published. The officially-provided answer to the question (the source indicated on the web page is "AFS-840") concludes that "what the phrase '. . . (1) Other pilots in air transportation service . . .' means in effect [is] that both pilots have to be employees of the same company in air transportation service and the training program must have been approved under Part 121 or Part 135 or 125 or 129, as appropriate...." We find it curious, however, that a subsequent portion of the same official response also appears to contradict the above-excerpted portion, vis-à-vis ATP certificate holders providing authorized instruction in the course of corporate Part 91 operations, when it states:

> the terms "interstate air transportation, overseas air transportation, and foreign air transportation" are defined as the carriage by aircraft of persons or property as common carrier (common carriage) for compensation or hire or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in [interstate] commerce[]."

See http://www.mmac.jccbi.gov/afs/afs600/pefaq.html (as linked from http://www.faa.gov/aviation.htm, "Designated Pilot Examiner Frequently Asked Questions") (emphasis added) (viewed January 13, 2000).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent’s appeal is granted; and

2. The law judge’s decision and the Administrator’s order of revocation are reversed.

HALL, Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.